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18 **UNITED STATES DISTRICT COURT**
19 **DISTRICT OF NEVADA**

20 APPLICATIONS IN INTERNET TIME, LLC,
21 Plaintiff,
22
23 v.
24 SALESFORCE.COM, INC.,
25 Defendant.

Civil Action No.: 3:13-CV-00628-RCJ-VPC

JOINT STATUS REPORT

26
27 The parties, through their attorneys of record, hereby submit the following Joint Status
28 Report.

1 **1. Current Status of the Case.**

2 On August 1st and August 4th, 2014, Salesforce petitioned for review of the claims of the
 3 asserted '482 and '111 patents as covered business methods by the Patent Trial and Appeal Board
 4 ("PTAB"). On November 3rd and November 4th, 2014, AIT filed Patent Owner Preliminary
 5 Responses to the Salesforce petitions. On February 2, 2015, a three judge panel of the Patent
 6 Trial and Appeal Board issued decisions declining to institute review of the claims of the '482
 7 and '111 patents on the ground that the challenged claims are not directed to covered business
 8 methods and would therefore not be subject to review; the Board did not address the merits of
 9 Salesforce's arguments as to whether the art identified in those petitions anticipates or renders
 10 obvious the claims of the '482 and '111 patents.
 11

12 However, the parties dispute whether the February 2, 2015 decisions constitute "final
 13 resolution" in accordance with the Court's August 25, 2014 Order staying this action.
 14

15 **AIT's position:** The Court entered a stay pending final resolution of the Covered
 16 Business Method Reviews requested by Salesforce. PTAB reached a final resolution when it
 17 denied both of Salesforce's petitions to review claims of the '482 and '111 patents on
 18 jurisdictional grounds, finding that the challenged claims are not directed to covered business
 19 methods and therefore not subject to its review. PTAB's decisions are final resolutions under the
 20 Court's Stay Order because 37 C.F.R. 42.71(c) is unambiguous: "A decision by the Board on
 21 whether to institute a trial is *final and nonappealable*."¹ Salesforce seeks to graft onto 37 C.F.R.
 22 42.71(c) the qualifier, "unless the party seeks a rehearing." Although 37 CFR § 42.71(d) permits
 23 motions for rehearing, this provision is not analogous to federal appeals because such "[a] request
 24 for rehearing does not toll times for taking action," reinforcing the conclusion that a petition for
 25

26
 27
 28 ¹ 37 C.F.R. 42.71(c) (emphasis added).² 37 C.F.R. 42.71(d). *See also Grobler v. Apple Inc.*,
 2013 U.S. Dist. LEXIS 172832 (N.D. Cal. Dec. 8, 2013) (refusing to continue a stay to await a
 party's pursuit of a petition for rehearing before the PTAB).

1 rehearing is not intended to result in the stay of any action.² Had the federal government intended
 2 that a request for rehearing postpone the finality of the PTAB's decision, it would have said so as
 3 it has done in other contexts.³

4 Motions for rehearing at the PTAB are disfavored and subject to a heightened abuse of
 5 discretion standard.⁴ It is estimated that PTAB grants less than 4% of all motions for rehearing of
 6 its decisions on petitions for review.⁵ Salesforce's suggestion that this Court should wait until it
 7 determines whether it will file a motion for rehearing before lifting the stay in this case is
 8 unreasonable and highly prejudicial to AIT. Under 37 CFR § 42.71(d), the party moving for
 9 rehearing must "identify all matters the party believes the Board misapprehended or overlooked,
 10 and the place where each matter was previously addressed in a motion, an opposition, or a reply."
 11 The low number of motions for rehearing granted by PTAB demonstrates the high hurdle
 12 established by this standard, and provides further support that PTAB itself views a decision not to
 13 institute trial as final. In addition, because there is no time limit for PTAB to decide a petition for
 14 rehearing, Salesforce's interpretation could potentially lead to an *indefinite extension* of the stay.⁶
 15 AIT therefore requests that the stay be lifted now.

16 **Salesforce's Position:** Salesforce contends that the PTAB's decisions denying institution
 17 of the CBM are not "final resolutions" within the meaning of the Court's August 25, 2014 Order.
 18

19 ² 37 C.F.R. 42.71(d). *See also Grobler v. Apple Inc.*, 2013 U.S. Dist. LEXIS 172832 (N.D.
 20 Cal. Dec. 8, 2013) (refusing to continue a stay to await a party's pursuit of a petition for rehearing
 21 before the PTAB).

22 ³ *See, e.g.*, 29 C.F.R. § 1614.405(b) (providing in the context of EEOC regulations that "[a]
 23 decision is final . . . unless a timely request for reconsideration is filed by a party to the case.");
 24 38 U.S.C. § 7103(a) (providing in the context of Veterans' Appeals that "the decision of the
 25 Board . . . is final unless the Chairman orders reconsideration of the decision").

26 ⁴ 37 C.F.R. 42.71(c).

27 ⁵ Jones Day Publications, *Requesting a Motion for Reconsideration/Rehearing at the PTAB? What You Need to Know*, November 2014, available at: http://www.jonesday.com/requesting-a-motion-for-reconsiderationrehearing-at-the-ptab-what-you-need-to-know-11-23-2014/#_ednref7.
 28 AIT has uncovered no case in which a motion for rehearing resulted in PTAB reversing a decision not to institute trial in a Covered Business Method Review.

⁶ 37 C.F.R. 42.71(c).

1 More particularly, as AIT does not dispute, Salesforce has not yet exhausted the administrative
 2 procedures available before the PTAB: Salesforce has until March 4, 2015 to file a petition for
 3 rehearing with respect to the PTAB's February 2, 2015 decisions. *See* 37 C.F.R. § 42.71(d)(2).
 4 Thus, there is no "final resolution" at this time under any reasonable interpretation of the term.
 5 Salesforce is entitled to file a petition at the PTAB for rehearing which, if granted, could result (as
 6 AIT does not dispute) in a resolution on the merits of Salesforce's CBM petitions that will
 7 simplify the issues before this Court.⁷

9 AIT's reliance on 37 CFR § 42.71(c) for the proposition that a "final resolution" has been
 10 reached is inapposite. This provision merely states that a decision by the PTAB on whether or
 11 not to institute a petition is not appealable to, *e.g.*, an Article III court (*see* 35 U.S.C. § 324(e)
 12 ("***No Appeal.***—The determination by the Director whether to institute a post-grant review under
 13 this section shall be ***final and nonappealable.***"); it does not state that an initial decision on this
 14 issue is a "final ***resolution***," as set forth in the Court's Stay Order. Indeed, AIT's interpretation
 15 of 37 CFR § 42.71(c) would either obviate the statutorily provided right to seek a rehearing set
 16 forth in Section 37 CFR § 42.71(d), or otherwise result in two separate "final resolutions."⁸ AIT
 17 also appears to assume that, based on the standard of review under Section 42.71(c), such
 18 requests for rehearing are "disfavored." AIT is incorrect: Salesforce possesses a *statutory right*
 19
 20
 21

22 ⁷ AIT cites to an article published by Jones Day to argue that the success rate on requests for
 23 rehearing is less than 4%. The numbers provided in that article do not distinguish between
 24 requests for rehearing in IPR and in CBM contexts—an important fact since the number of IPR
 petitions filed has consistently outnumbered filed CBM petitions by 8 times, and because CBM
 petitions are substantively different from IPRs and are animated by different policy goals.

25 ⁸ AIT's citations to regulations governing the EEOC and Board of Veterans Affairs as somehow
 26 informing the interpretation of 37 CFR § 42.71(c) are misplaced, as neither regulation governs
 27 whether an agency decision is a "final resolution" for purposes of lifting a stay in a district court
 28 action. Instead, 29 CFR § 1614.405(c) discusses finality only within the context of § 1614.407,
 which governs whether a party before the EEOC may institute a civil action. Likewise, 38 U.S.C.
 § 7103 discusses finality only with regard to whether a party before the Board of Veterans'
 Affairs may appeal a decision by the Board to the United States Court of Appeals for Veterans
 Claims. *See* 38 U.S. Code § 726.

1 to seek rehearing⁹; AIT cites no statutory authority or case law stating that such petitions for
 2 rehearing are “disfavored.”

3 AIT’s reliance on language from 37 CFR § 42.71(d) regarding tolling of deadlines also
 4 misses the mark. The language cited by AIT merely provides that the time to take action in
 5 response to a non-final PTAB decision or to appeal a PTAB decision is not tolled by a request for
 6 rehearing. It does not, as AIT claims, determine in any respect whether Salesforce’s CBM
 7 petitions (or any other AIA petition) have reached a “final resolution” for purposes of a stay order
 8 in an Article III court.¹⁰

10 AIT’s argument that Salesforce’s request for an “indefinite” stay is “unreasonable and
 11 highly prejudicial” belies the facts: AIT is a non-practicing patent owner whose sole business is
 12 to conduct patent litigation. Requests for rehearing are typically resolved quickly. According to
 13 Salesforce’s research, of the five most recent decisions granting requests for rehearing, the
 14 average time from request to decision was 53.4 days; in one case the PTAB took only 10 days to
 15 grant a request for rehearing.¹¹ Of the five most recent denials of requests for rehearing, the

18 ⁹ Salesforce further notes that an “erroneous application of law” meets the standard of review set
 19 forth in 37 CFR § 42.71(c). See *Lacavera v. Dudas*, 441 F.3d 1380, 1383 (Fed. Cir. 2006).
 20 Applying AIT’s logic, an appeal from a district court order arguing an erroneous interpretation of
 law would be “disfavored.” See *Strauss v. Comm’r of the Soc. Sec. Admin.*, 635 F.3d 1135, 1137
 (9th Cir. 2011).

21 ¹⁰ AIT’s reliance on *Grobler v. Apple Inc.*, No. 12-CV-01534-JST, 2013 WL 6441502 (N.D.
 22 Cal. Dec. 8, 2013) is inapposite: the stay order in *Grobler* did not premise the parties’ submission
 of a status update upon a “final resolution” of pending PTAB proceedings—as is true here—but
 23 instead required a status update to the court upon a “decision by the USPTO.” Order, *Grobler v.*
 24 *Apple Inc.*, Case No. 12-cv-01534-JST (N.D. Cal. June 6, 2013). Moreover, in *Grobler*, unlike
 here, the party that was the beneficiary of the stay (1) did not even file the IPR petition at issue,
 (2) deliberately chose to *not* join the IPR proceedings until after they had been terminated by the
 PTAB, and (3) had already filed a failed motion for reconsideration at the PTAB. Moreover, it is
 25 common practice in this circuit for courts to stay litigation for the entire duration of AIA
 proceedings, inclusive of requests for rehearing. See *PersonalWeb Technologies, LLC v.*
 26 *Facebook, Inc.*, No. 5:13-CV-01356-EJD, 2014 WL 116340, at *6 (N.D. Cal. Jan. 13, 2014)
 (granting stay until “final exhaustion of all relevant review proceedings, including appeals”).

27 ¹¹ See Paper No. 17, *Handi Quilter, Inc. and Tacony Corporation v. Bernina International AG*,
 IPR2014-00270 (December 30, 2014) (167 days to rehearing decision); Paper No. 21, *TRW*
 28 *Automotive US LLC v. Magna Electronics, Inc.*, IPR2014-00266 (August 11, 2014) (32 days to
 decision); Paper No. 13, *FourSquare Labs, Inc. v. Silver State Intellectual Technologies, Inc.*,
 IPR2014-00159 (August 1, 2014) (51 days to rehearing decision); Paper No. 14, *Facebook, Inc. v.*

1 average time from request to decision was only 36.8 days, and in one case the PTAB took only 12
 2 days to deny the request.¹² As a result, maintaining the current stay in accordance with the
 3 Court's August 24 Order would not result in any tangible prejudice to AIT.¹³

4 In view of the continuing nature of the pending CBM petitions, Salesforce submits that the
 5 setting of further scheduling in this action is premature. Salesforce therefore submits that the
 6 parties file a Status Report and joint proposed schedule within 10 days of a final resolution of the
 7 merits of Salesforce's CBM petition, i.e., once Salesforce has exhausted the administrative
 8 procedures available before the PTAB ("Final Resolution"), in accordance with the Court's prior
 9 Order staying the action.
 10

11 **2. Proposed schedule.**

12 As set forth above, the parties dispute whether proposing additional dates for scheduling
 13 in this action is appropriate at this time.
 14

15 While Salesforce provides proposed dates herein premised upon the date of a Final
 16 Resolution in the pending CBM petitions in order to not prejudice any rights it may have in
 17 connection with this joint submission, Salesforce respectfully submits that the setting of any such
 18 additional dates should take place once a Final Resolution has been reached.

19 **a. A deadline for the completion of discovery.**

20
 21 *Rembrandt Social Media, L.P.*, IPR2014-00415 (July 31, 2014) (10 days to rehearing decision);
 22 Paper No. 36, *K-40 Electronics, LLC v. Escort, Inc.*, IPR2013-00203 (May 30, 2014) (7 days to
 decision).

23 ¹² See Paper No. 23, *Synopsys, Inc. v. Mentor Graphics Corporation*, IPR2014-00920 (January
 24 22, 2015) (23 days to rehearing decision); Paper No. 28, *Spectra Logic Corporation v. Overland
 Storage, Inc.*, IPR2013-00357 (January 8, 2015) (12 days to decision); Paper No. 10, *HTC
 Corporation and HTC America, Inc. v. E-Watch, Inc. and E-Watch Corporation*, IPR2014-00987
 25 (January 7, 2015) (15 days to decision); Paper No. 10, *Torrent Pharmaceutical LTD. v. Merck
 Frosst Canada & Co.*, IPR2014-00559 (January 7, 2015) (70 days to decision); Paper No. 17, *The
 Jewelry Channel, Inc. USA d/b/a Liquidation Channel v. America's Collectibles Network, Inc.*,
 26 CBM2014-00119 (January 6, 2015) (64 days to decision).

27 ¹³ To the extent AIT asserts that "Salesforce has not identified any purported omission by
 PTAB," Salesforce submits that it is highly premature to require it to identify the bases for a
 28 motion not due for another three weeks. In any event, should the Court believe that Salesforce's
 provision of such information would be of benefit to the Court, Salesforce is prepared to provide
 such at the Court's request.

As set forth in the parties' Discovery Plan and Scheduling Order (Dkt. No. 36) filed on March 13, 2014, special scheduling review was requested and adopted by the Court (Dkt. No. 42). Pursuant to that Order, all discovery shall be completed sixty (60) days after rebuttal expert disclosures are served.

b. A deadline for amending the pleadings and adding parties

AIT proposes that all motions to join other parties, and to amend or supplement the pleadings, shall be filed on or before May 29, 2015, provided that motions for leave to amend the pleadings to plead defenses such as inequitable conduct based on discovery shall be filed on or before July 10, 2015.

Salesforce proposes that all motions to join other parties, and to amend or supplement the pleadings, shall be filed on or before 120 days following the Final Resolution, provided that motions for leave to amend the pleadings to plead defenses such as inequitable conduct based on discovery shall be filed on or before 160 days following the Final Resolution.

3. Disclosures and Briefing Required by the Patent Local Rules:

Except for the dates otherwise revised below, the Parties do not seek to alter the Discovery Plan and Scheduling Order entered by the Court (Dkt. No. 42):

Event	AIT Proposal	Salesforce Proposal
Plaintiff to serve initial disclosure of asserted claims and infringement contentions pursuant to Local Rule 16.1-6.	Served	Served
Plaintiff to produce documents accompanying initial disclosure of asserted claims and infringement contentions pursuant to Local Rule 16.1-7.	Served	Served
Defendant to serve initial	Served	Served

1	disclosure of		
2	noninfringement, invalidity		
3	and unenforceability		
4	contentions pursuant to		
5	Local Rule 16.1-8		
6	Defendant to produce	Served	Served
7	documents		
8	accompanying initial		
9	disclosure of		
10	invalidity contentions		
11	pursuant to Local Rule		
12	16.1-9.		
13	Plaintiff to serve response	March 6, 2015	45 Days following Final
14	to initial noninfringement,		Resolution on CBM Petitions
15	invalidity and		
16	unenforceability		
17	contentions pursuant to		
18	Local Rule 16.1-10.		
19	Pre-Claim Construction	TBD by Court	TBD by Court
20	Settlement Conference		
21	pursuant to Local Rule		
22	16.1-19(a)		
23	Exchange of proposed	March 20, 2015	14 days following Rule 16.1-10
24	terms for claim		Disclosures.
25	construction pursuant to		
26	Local Rule 16.1-13.		
27	Parties to meet and confer	April 3, 2015	14 days following exchange of
28	regarding claim		proposed terms for claim
	terms pursuant to Local		construction
	Rule 16.1-13.		
	Exchange of preliminary	April 20, 2015	28 days following exchange of
	claim constructions		claim term for construction
	and extrinsic evidence		
	pursuant to Local Rule		
	16.1-14.		
	Joint Claim Construction	May 15, 2015	14 days following Rule
	and Prehearing		16.1-14 exchange.
	Statement to be submitted		
	pursuant to Local		
	Rule 16.1-15.		
	Plaintiff to submit opening	June 19, 2015	28 days following Rule 16.1-15
	claim construction		submission.
	brief pursuant to Local		
	Rule 16.1-16.		
	Defendant to submit	July 17, 2015	28 days following submission of
	responsive claim		Plaintiff's opening claim
	construction brief pursuant		construction brief

1	to Local Rule 16.1-16.		
2	Plaintiff to submit reply	July 31, 2015	14 days following submission of
3	claim construction		Defendant's responsive claim
4	brief pursuant to Local		construction brief
5	Rule 16.1-16.		
6	<i>Markman</i> Hearing	TBD by Court	TBD by Court
7	Post-Claim Construction	TBD by Court	TBD by Court
8	Order Settlement		
9	Conference pursuant to		
10	Local Rule 16.1-19(b)		
11	Expert disclosures under	Expert disclosures on issues	Expert disclosures on issues for
12	Fed. R. Civ. P. 26(a) due	for which a party bears the	which a party bears the burden of
13		burden of proof are due within	proof are due within forty-five
14		forty-five (45) days after the	(45) days after the Court's
15		Court's <i>Markman</i> claim	<i>Markman</i> claim construction
16		construction decision; rebuttal	decision; rebuttal expert
17		expert disclosures are due	disclosures are due forty-five (45)
18		forty-five (45) days thereafter	days thereafter
19	Completion of expert	Sixty (60) days after rebuttal	Sixty (60) days after rebuttal
20	depositions	expert disclosures are served	expert disclosures are served
21	Dispositive motions due	Sixty (60) days after the close	Sixty (60) days after the close of
22		of discovery.	discovery.
23	Joint Pretrial Order due	Thirty (30) days after the close	Thirty (30) days after the close of
24		of discovery or thirty (30) days	discovery or thirty (30) days after
25		after decision on the	decision on the dispositive
26		dispositive motions, whichever	motions, whichever is later
27		is later	
28	Pretrial Settlement	TBD by Court	TBD by Court
	Conference pursuant to		
	Local Rule LR 16.1-19(c)		

DATED: 2/17/15

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McDonald Carano Wilson LLP
John Frankovich
Leigh Goddard

ORDER

IT IS HEREBY ORDERED that the stay is LIFTED and the parties shall proceed in this case pursuant to the Local Rules.

IT IS SO ORDERED this 27th day of April, 2015.

Robert C. Jones
ROBERT C. JONES